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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-25

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN RENAISSANCE LINES, INC., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In negotiating a full shipload charter, did the Commodity Credit Corporation (CCC) and respondent shipowner intend to be bound by an oral agreement concluded by telephone, where the parties negotiated in contemplation of the execution of a specific, complex written charter form and the negotiations broke down before the form was executed or important provisions therein agreed to?

2. May CCC maintain an action for damages for breach of an unperformed charter contract with a private shipping firm, concluded without any written

confirmation or documentary evidence of an offer and acceptance, in light of—

(a) 31 U.S.C. § 200(a)(1), which requires "documentary evidence" of an "agreement in writing" for the creation of an obligation by the United States;

(b) Sections 1-1.208 and 1-1.219 of the FPR, which define "contract" and "contract modification" in terms of a requirement for "a writing"; and

(c) CCC's own regulations requiring the conclusion of any contract for the rendering of ocean transportation services by means of a written contract on CCC's own forms.

SUPPLEMENTARY STATEMENT OF FACTS

CCC's telegram invitation of May 4, 1966 stated that "FOR FULL CARGOES USDA GRAIN CHARTER PARTY DATED MARCH 1, 1963 (REVISED) TO BE USED." This charter form is a highly detailed eight-page agreement, with blank spaces provided for insertion of material pertinent to each particular contract. In a telephone call from ARL's agent to CCC on May 9, 1966, ARL quoted rates in short tons. CCC claims, however, that rates were quoted in long tons. The invitation left open for negotiation choice of ports of loading, loading and discharge demurrage and dispatch, and other charter details. These matters were not resolved or agreed to on May 9. This was ARL's first and only negotiation with the CCC for a charter from the United States (Appendix 93).

The price quoted by ARL was contingent on ARL's successful purchase of a vessel. On May 11, 1966, ARL's agent called CCC to say the vessel had been purchased, but shortly thereafter called again to say the purchase had fallen through (App. 4, 35). The telegram from ARL to CCC on May 18, 1966 did not admit

liability for breach but offered to pay CCC's storage charges on a voluntary basis so as to retain the goodwill of that agency for possible future business (App. 199).

ARL's agent stated in his deposition that he had no indication this was not a charter for CCC and was not aware of distinctions which the government was trying to make between Title I and Title II PL-480, so as to bring in A.I.D.'s regulation published only on April 21, 1966 (Deposition of Clifford Elkins, p. 55).

Suit for breach of an oral contract was instituted by the government only after the government (A.I.D.) and ARL had settled an unrelated action by ARL by consent judgment in favor of ARL in Civil Action No. 68-285 (E.D.N.Y. 1971). The government in that case did not claim a set-off, but after the judgment issued, refused to pay the judgment amount of $43,421 raising this new claim for the first time as a ground for withholding funds. Suit was filed 5½ years after the alleged oral agreement was reached by telephone.

REASONS FOR DENYING THE WRIT

1. The government is interested primarily in reversing the construction given to 31 U.S.C. § 200(a)(1) by the Court of Appeals. But the statutory-construction issue cannot be effectively isolated from the three other independent grounds upon which the decision stands.[1]

[1] The Court of Appeals made clear in its conclusion that it was supporting its decision in equal part upon a contract construction basis, i.e., the intention of the parties as indicated by the entire circumstances, the complexity of the contemplated written agreement, and the "extent of the unfilled blanks in the form". The Appeals Court also separately rested its decision upon the requirement for a writing found in the FPR and in CCC's own Title I PL-480 regulation, 7 C.F.R. § 11.12.

None of the other three grounds is by any stretch "certworthy", and the government must pass through a minefield of difficulties to get past the three other grounds before it can hope to engage the attention of the Court on the statutory issue.

The government can not, however, get by the contract interpretation issue. The case law is persuasive that where parties negotiate orally in contemplation of a written contract, their intention is presumptively that they shall be bound only when that written contract is executed. This becomes especially true where the contract to be signed is complex, many important subsidiary terms are still to be negotiated, and a government agency is one party to the negotiations.[2]

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[2] See, e.g., *Orient Mid-East Great Lakes Service* v. *International Export Lines*, 315 F.2d 519, 523 (C.A. 4, 1963), where the charter agreement was negotiated between two private parties. In *Banking & Trading Corp.* v. *Floete*, 257 F.2d 765, 769-70 (C.A. 2, 1958), the Court noted "factors to be considered in determining whether parties are bound prior to the execution of an integrated writing". In that case, as here, a government agency was one of the parties. Among such relevant factors were these:

(1) "[W]hether [the contract] has few or many details";

(2) "[W]hether the amount involved is large or small";

(3) "[W]hether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract";

(4) "Whether during the negotiations the parties have fully agreed upon all of the details of the transaction, or whether pending final execution of a written document some of those details have remained unsettled";

(5) And whether one of the parties is a government agency.

"As a government agency, RDC was subject to investigation and audit concerning the use which it made of public funds. Hence it was important that whenever RDC en-

The government can not get by the FPR argument, because these regulations apply both to CCC and to A.I.D.[3] Introducing the A.I.D. regulation, 22 C.F.R. Part 211, provides the government with no help. The A.I.D. regulation does not authorize the conclusion of an oral contract; nor does it in any way modify A.I.D.'s acceptance of the FPR provisions. The FPR requirement for expression of an obligation "in writing" remains unaffected by the A.I.D. regulation to which the government seeks to draw attention. Nor can the government get by the CCC regulation which requires a writing in connection with charter approvals.[4] After

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tered into contractual relationships its legal rights and obligations be clearly defined."

Applying these factors, the Court refused to find that a contract had been concluded in the absence of the execution of a written document.

[3] The definitional sections of the FPR, 41 C.F.R. §§ 1-1.208 and 1-1.219, define a "contract" as an obligation expressed "in writing" and a "contract modification" as any "written alteration." These regulations apply to any direct procurement by a government agency. A Federal agency may, in that section of the regulations reserved to it, change or supplement the FPR to accord with specific agency needs, 41 C.F.R. §§ 1-1.002 and 1-1.006-1. Both CCC and A.I.D. accepted the FPR and did not modify the requirement for a writing (41 C.F.R. §§ 4-1.104-1 and 7-1.103). Because the FPR provisions in question go to the very heart, the definitional matter of what is a contract, whenever "contract" appears anywhere in the regulations it connotes an offer and acceptance "in writing".

[4] 7 C.F.R. § 11.12 declares:

§ 11.12 Ocean Transportation

(a) *General* • • • [T]he pertinent terms of all proposed charters . . . and all proposed liner bookings must be submitted to the appropriate USDA Office (see paragraph (b) of this section) for review and approval prior to fixture of the vessel. Tentative advance approvals may be obtained by

all, this was a CCC telegram offer, a CCC oral negotiation, CCC's regulation, and CCC's personnel; there was no relationship at all in this case to A.I.D.[5]

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telephone or telegram, provided Form CCC 105, Ocean Shipment Data—PL 480 ("Request for Vessel Approval"), is furnished promptly confirming the information supplied by telephone or telegram. Approvals of charters and liner bookings will be given on Form CCC 106, "Advice of Vessel Approval."

• • • • •

(b) *Request for vessel approval.* In order to obtain approval of proposed vessel bookings the following forms shall be submitted in duplicate to the office indicated:

• • • • •

(2) *For commodities other than cotton.* Form CCC 105, Ocean Shipment Data—PL 480—"Request for Vessel Approval," shall be submitted to the Director, Program Operations Division, Foreign Agriculture Service, U.S. Department of Agriculture, Washington, D.C., 20550.

• • • • •

(f) *Advice of vessel approval.* Advice of vessel approval will be issued as follows:

• • • • •

(2) *For commodities other than cotton.* Form CCC 106 signed by the Director, Program Operations Division, ...

[5] The government seeks to persuade the Court, as it was unable to persuade the Court of Appeals, that Title II PL-480, 7 U.S.C. §§ 1721-25, relating to food shipments for needy people, and not Title I PL-480, 7 U.S.C. §§ 1691, 1701-10, authorizes the procurement of goods and ocean transportation in this particular case. The significance of the distinction appears to be that CCC's published regulation deals only with Title I (and 7 C.F.R. § 11.12 implements ocean transport shipments under Title I.) CCC has no Title II regulation. On April 21, 1966, A.I.D. published a regulation under the authority of Title II PL-480 and later collated that regulation into 22 C.F.R. Part 211. But no one outside of government could possibly know or care about these distinctions. At a deposition called for by the government, ARL's agent who conducted the oral negotiations on May 9, 1966 testified he did not know of a distinction between Title I and Title II PL-480, had no reason to know, and had no basis not to believe that this was a

Aware of its difficulties, the government drags in CCC's enabling legislation, 15 U.S.C. 714c(g), in the hope of leap-frogging the alternative grounds for decision with an argument that makes much of CCC's enabling legislation allowing CCC to use "customary channels, facilities and arrangements of trade and commerce." But such generalized language contains no Congressional purpose or authorization that CCC shall not be bound by the FPR, by that agency's own published regulations, or by any of numerous other statutory enactments governing procurement by government entities.[6]

CCC sponsored shipment. For the first time in these proceedings the government makes reference to E.O. 10900, 26 Fed. Reg. 143, for the proposition that the President had directed the Secretary of State and not CCC to oversee functions reserved to the President by Title II PL-480. But an examination of Title II legislation indicates that the Congress vested the administration of the Title II freight program in CCC, a government corporation, and not in the President, 7 U.S.C. § 1723. The E.O. can only affect 7 U.S.C. §§ 1721-22 which specify functions reserved to the President. The E.O., even had it been known to ARL's agent, would certainly not have pointed him to A.I.D.; and the A.I.D. regulations had just come out 13 days before the May 4, 1966 bid solicitation, so that ARL's agent would have had to be familiar with the daily Fed. Reg. publication to catch the A.I.D. issuance. He also would have had to determine whether the food shipment covered by CCC's telegram was a shipment to a "friendly government" under Title I "to combat hunger and malnutrition and to encourage economic development" (7 C.F.R. § 1691) or a Title II shipment "to meet famine or other urgent or extraordinary relief requirements; [or] to combat malnutrition, especially in children" (7 U.S.C. § 1721).

[6] Of course, if this were truly an A.I.D. and not a CCC program, there is no reason even to consider CCC's enabling legislation. It would be curious to allow the government to apply an A.I.D. regulation, when it suited one purpose, but CCC's enabling legislation when it suited another.

In any event, cases cited in the government's petition at footnote No. 9 hardly prove the contention that it is customary to

2. There is no conflict on the statutory issue between the decision of the Court of Appeals and decisions of the Court of Claims. *Escote Manufacturing Corp.* v. *United States,* 169 F.Supp. 483 (Ct.Cl. 1959), and *Penn-Ohio Steel Corp.* v. *United States,* 354 F.2d 254 (Ct.Cl. 1965), did not even consider 31 U.S.C. § 200 (a)(1). The reference in these cases to an absence of a federal statute of frauds was at best only a passing observation.[7]

Decisions by the Comptroller General which have focused on 31 U.S.C. § 200(a)(1) have supported the notion that the underlying commercial contract representing an obligation of the United States must consist of an offer and an acceptance "in writing".[8]

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regard a maritime charter as enforceable before execution of the written charter. In none of the cases footnoted, was a government agency a party; most of the cases do not consider charters at all; and neither the statute nor the question of oral agreements looking to execution of complex written forms is considered in any of these cases. *Orient Mid-East Great Lakes Service, supra* and *Banking & Trading Corp., supra* are the only well-reasoned opinions in the area.

[7] Indeed, the oral amendment to the lease in Penn-Ohio occurred in January 1954, before the statute was enacted and five years before the FPR was issued. *Escote* arose before the FPR was issued. The dispute in that case did in fact involve a written agreement and the Court spoke of an oral contract when in reality it was referring only to an unsigned written agreement.

[8] At 35 Comp. Gen. 319 (1955) the Comptroller General declared that "Before it can be held that there was a binding agreement, in each instance the following factors must be present: . . . Each bid must have been in writing." In decision No. B-118654 dated August 10, 1965 (the full text of which was included at pp. 101-104 of the Appendix), the Comptroller General quoted from the legislative history of the section, H.Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954), reproduced in part at 494 F.2d at p. 1065, and then stated: "The question for decision is whether the award notice signed by the contracting officer is documentary evi-

3. The government exaggerates the significance of the statutory-construction issue. If the interpretation of 31 U.S.C. § 200(a)(1) given by the Court of Appeals were to be overturned, nothing much would be changed thereby. The FPR and CCC's own regulations would still bar the enforceability of purely oral charters. To reach the result which the government feels is important, not only would the present interpretation of the statute have to be overturned, but the GSA would also have to amend the FPR.[9]

In arguing for the importance of the issue, the government suggests that in emergency situations ("domestic disaster relief", petition, p. 7) oral contracts are necessary. But here there clearly was no emergency procurement. The telegram solicitation for offers was issued on May 4, 1966, but oral negotiations took place

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dence of a binding agreement in writing between the parties to permit the obligation of funds under the requirements of § 1311 in the absence of any evidence in writing that the contractor has agreed to the price and terms contained therein as well as to the usual general provisions required to be included in Government contracts. As a general proposition, we think not. * * * [T]he language quoted above from the Conference Report contemplates documentary evidence of both an offer and acceptance imposing liability on both parties even though the definitive contract will be executed later." This is essentially the same rule adopted without regard to § 200(a)(1) for government agents in *Banking and Trading Corp., supra*, at pp. 769-70.

[9] The government states in its petition (pp. 7-8) that the GSA makes use of oral contracts. But the GSA is also the agency responsible under the Federal Property Act for issuing and modifying the FPR. The issue of oral contracts can hardly have been perceived by GSA as of burning importance, since that agency has since 1959 allowed the FPR to declare, without change, that contracts and contract modifications must be "in writing". The GSA view on this matter was never communicated by the government to either of the lower courts which considered this matter.

days later on the 9th and 11th of May. The government agency can almost always ask for a telex or telegram response or confirmation, as it could have here. Such a telegram recordation of the offer will avoid problems such as this case will present if it goes to trial as to what exactly was agreed to (long tons or short tons, what was the daily demurrage/dispatch rate, and what exactly did the parties intend in numerous other important details of the overall arrangement).

Significantly, emergency procurement is not an issue under the statute. A government agency having to undertake emergency procurement can avoid the requirement for a "writing" in paragraph (a)(1) of the statute by relying upon the "public exigency" exception set forth in paragraph (a)(4) of the same statute.[10] That in the present case no emergency procurement was involved can be seen from the fact that the government never urged that these charter negotiations should be encompassed under subparagraph (a)(4) rather than (a)(1) of 31 U.S.C. § 200.

Broad consequences do not attach to the statutory-construction issue. The government has not cited a single case in which litigation was originated by the United States for breach of an oral contract, and respondent can find none either. There is reason to believe this case is the first time ever that such a litigation has been initiated by the government and there is no

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[10] The requirement for "a binding agreement in writing" appears only in 31 U.S.C. § 200(a)(1). Various subsections of § 200(a) set out alternatives. Subparagraph (a)(4) authorizes the creation of an obligation, without mentioning the requirement for an agreement in writing, "when necessitated by public exigency or for perishable subsistence supplies." CCC's problem then would appear to be not with the statute, but with the FPR and with its own regulations which do not contain a similar exception for emergency procurement.

reason to expect many such other cases to arise. There are no such other cases now pending. The United States has comfortably existed with federal statutes of frauds for a good portion of its history.[11]

In any event, the tendency in commercial matters has in modern times been towards and not away from a requirement for a writing.[12] In governmental affairs the

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[11] Compare, the Act of June 2 and 17, 1862, 12 Stat. 411 and 597, considered in *Clark* v. *United States*, 95 U.S. 593 (1877), and the Act of June 15, 1917, Chap. 19, § 1, 40 Stat. 198 (repealed in 1941 by 55 Stat. 743). These statutes required a "writing" and the signatures of both contracting parties. With respect to the 1917 legislation, the filing of the document with an office of the Interior Department was also required. The only gap in recent U.S. history in which no such statute applied appears to be the interval 1941 through August, 1954. Whatever 31 U.S.C. § 200 (a)(1) might otherwise mean, at least since 1959, when the FPR was issued, government agencies have been operating under a regulatory-type statute of frauds.

[12] For comparison, note that the Uniform Commercial Code, accepted as Federal law, *In re King-Porter Company*, 446 F.2d 722, 732 (C.A. 5, 1971); *United States* v. *Hext*, 444 F.2d 804, 810-11 (C.A. 5, 1971), and applied in admiralty matters, *David Crystal, Inc.* v. *Cunard Steamship Company*, 223 F.Supp. 273, 286-87 (S.D.N.Y. 1963), aff'd, 339 F.2d 295 (C.A. 2, 1964), cert. denied 380 U.S. 976 (1965), states in § 2-201(1) that any contract covering a price in excess of $500 "is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties". Although the UCC provisions speak specifically about the sale of goods, the line of demarcation at $500 adopted by the drafters of the Code suggests an order of magnitude for the application of a presumption concerning the intention of parties negotiating a charter (claimed by the government to have a value of $354,481—assuming long tons—and claimed by ARL to have a value closer to $400,000—assuming short tons) whether to be bound by oral negotiations prior to executing a complex legal document. The UCC is now law in fifty states and the § 2-201(1) provision shows that the government's argument runs against the current of the times. The UCC provision in its D.C. enactment appears at 28 D.C. Code, § 2-201.

tendency has been for government agencies to run on paper records and determinations and not on oral promises and acceptances.

4. This case is an unattractive vehicle in which to consider the statutory-construction issue. It is a case which should be considered a garden-variety breach of contract claim turning upon the presumed intention of the parties. If the Court were to reverse, the matter would then still have to go to trial. But the oral negotiations which allegedly resulted in an oral contract occurred 8½ years ago, and government officials involved in the matter in May 1966 have departed. It would be difficult to reconstruct those telephone conversations accurately after such a long period. And it is likely that after such a trial the government would still not prevail because of the failure of the individuals to the May 9 telephone conversation to agree on all important terms.

There is, in addition, a suspicion that this case arose only because the government had second thoughts about the consent judgment to which it had agreed with ARL in the unrelated case before the Eastern District of New York, Civil Action No. 68-285, judgment issued April 27, 1971. The government never raised a set-off claim against ARL in that case based upon the alleged oral contract in this case. The government's refusal shortly thereafter to make payment on the judgment suggests that the oral contract matter was dredged up as an afterthought—an excuse for withholding funds because CCC and A.I.D. had misgivings about the wisdom of the settlement. Even so, the government waited 5½ years after the May 1966 conversations to initiate suit. In these circumstances, the Court should not accept this case as a vehicle to test the correctness

of the statutory interpretation adopted by the Court of Appeals.

5. If the Court reaches the statutory construction issue, nothing in the government's arguments on the statute will be found persuasive. There is no basis for the contention that the statute is designed to serve *only* a recordation purpose and not concurrently and unavoidably a statute of frauds objective as well. The two functions of the statute cannot be separated. The legislative history fully supports the notion that the Congress had in mind an underlying offer and acceptance when it enacted the legislation.[13] The government's argument of "no mutuality" carries little conviction with it;[14] and its reliance upon *United States* v. *New*

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[13] Congress was concerned that the Administration was obligating funds and making commitments to third parties which could not be verified to the Congress and which members of Congress suspected were not true, valid obligations in a commercial sense. Thus the House Report on the bill refers to a "true obligation" as opposed to merely an informal, oral, non-binding obligation of the government. Report of the Committee on Appropriations No. 2266 (83d Cong.), pp. 49-50. In the debates, Congressman Vorys, sponsor of the bill, spoke of "a true, *legal*, actual obligation", 100 Cong. Rec. 11476 (emphasis added). Such language does not appear concerned with accounting and reporting procedures alone, but rather refers unquestionably, to the binding force of the underlying contract between a government agency and a third party.

[14] The text of the statute does not support a "no-mutuality" reading, and there is no indication that the Congress intended a one-sided application for the statute. On the contrary, the Conference Committee Report, H.R.Rep. No. 2663, 83d Cong. 2d Sess. (1954), stated that § (a)(1) of the statute "contemplates documentary evidence of both an offer and an acceptance imposing liability on both parties." This language was quoted by the Comptroller General in interpreting the statute in decision No. B-118654 (App. p. 102).

Other statutes of frauds invariably require that an undertaking appear in writing and be signed by the party against whom enforcement is sought. Cf., UCC § 2-201.

York & Porto Rico S.S. Co., 239 U.S. 88 (1915) is wholly unpersuasive.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[15] In that case, the private contractor had signed the contract. In a suit by the government, the statutory requirement had been fully met as against the party sought to be charged with liability. That case is in any event 60 years old and refers to an earlier statute requiring a seal. It was only the seal which was missing from the document there at issue.